

*United States Court of Appeals  
for the Second Circuit*



**APPELLANT'S  
BRIEF**



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74-2248

United States Court of Appeals  
For the Second Circuit.

ECONOMIC OPPORTUNITY COMMISSION OF NASSAU COUNTY,  
INC.,

*Appellant,*

*against*

CASPAR WEINBERGER, individually and in his capacity as Secretary of the Department of Health, Education and Welfare; BERNICE BERNSTEIN, individually and in her capacity as Regional Director of the Department of Health, Education and Welfare, Region 2; SAUL ROSONOFF, individually and in his capacity as Acting Director of the Office of Child Development of the Department of Health, Education and Welfare; JOSUE DIAZ, individually and in his capacity as Regional Program Director of the Office of Child Development of the Department of Health, Education and Welfare for Region 2, and LESTER MILLER, individually and in his capacity of Board Chairman of the Glen Cove Child Day Care Center, Inc.,

*Appellees.*

APPEAL FROM DECISION OF THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT.

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UNITED STATES COURT OF APPEALS  
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ECONOMIC OPPORTUNITY COMMISSION OF NASSAU  
COUNTY, INC.,

Appellant,

-against-

CASPAR WEINBERGER, individually and in his capacity as Secretary of the Department of Health, Education and Welfare; BERNICE BERNSTEIN, individually and in her capacity as Regional Director of the Department of Health, Education and Welfare, Region 2, SAUL ROSOFF, individually and in his capacity as Acting Director of the Office of Child Development of the Department of Health, Education and Welfare; JOSUE DIAZ, individually and in his capacity as Regional Program Director of the Office of Child Development of the Department of Health, Education and Welfare for Region 2; and LESTER MILLER, individually and in his capacity of Board Chairman of the Glen Cove Child Day Care Center, Inc.,

Case Number  
74-2248

Appellees.

BRIEF FOR APPELLANT

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

- (1) Was the decision by the Department of Health, Education & Welfare to defund the Economic Opportunity Commission of Nassau County, Inc. invalidly made in that it was arbitrary, capricious, inconsistent with applicable statutes and regulations and unsupported by substantial evidence?
- (2) Were the standards and procedures utilized by the Department of Health, Education & Welfare in deciding Glen Cove Child Day Care Center, Inc.'s appeal fatally defective in that they did not apply the standard required by Office of Economic Opportunity Instruction 6441-1, and in that insufficient ad hoc procedures were utilized?
- (3) Did the Department of Health, Education & Welfare have authority to defund the Economic Opportunity Commission of Nassau County, Inc. in light of their failure to prescribe appellate procedures required by statute?
- (4) Was the Department of Health, Education & Welfare's decision to fund Glen Cove Child Day Care Center, Inc. directly in excess of Department of Health, Education & Welfare's statutory authority?

PRELIMINARY STATEMENT PURSUANT TO  
SECOND CIRCUIT RULES SECTION 28

This is an appeal from the decision rendered by the Honorable Jacob Mishler, U. S. D. J., dated July 25, 1974.

STATEMENT OF THE CASE

The instant case is an appeal of a decision of the United States District Court for the Eastern District of New York, which decision summarily refused to enjoin the Federal Appellees from defunding Appellant Economic Opportunity Commission of Nassau County, Inc., and from funding the Appellee Glen Cove Child Day Care Center, Inc.

The instant action was commenced by the service of a Summons dated March 1, 1974 and a Complaint. Issue was joined by service of an Answer by the Federal Appellees, dated April 30, 1974. The Appellant Economic Opportunity Commission of Nassau County, Inc. moved by Order to Show Cause returnable on April 19, 1974, for an order granting a preliminary and permanent injunction enjoining the Federal Appellees from defunding the Appellant, requiring the Federal Appellees to continue funding the Appellant, enjoining the Federal Appellees from directly funding Glen Cove Child Day

Care Center, Inc., and other related relief. Appellees moved for Summary Judgment on the grounds that (1) the District had no jurisdiction; (2) the Appellant had no standing; and (3) the Appellant failed to state a claim upon which relief could be granted. Appellant cross-moved for Summary Judgment.

By a Memorandum of Decision and Order dated July 25, 1974, Judge Mishler found that there was no genuine issue of fact and granted the Appellees' motion as to ground (3) only, and denying said motion as to grounds (1) and (2).

The Appellant (hereinafter referred to as "EOC") is a Community Action Agency as defined in 42 USCA 2790, for the purpose of effectuating and implementing the provisions of the Economic Opportunity Act of 1964 (42 USCA 2701, et seq.) (District Court opinion p. 2, hereinafter referred to as "D.C. \_\_\_\_"). The Appellant has been designated as the grantee agency for the County of Nassau in accordance with these provisions. (D.C. 2)

The Appellees, WEINBERGER, BERNSTEIN, ROSOFF and DIAZ are agents of the Appellee, DEPARTMENT OF HEALTH, EDUCATION & WELFARE and the OFFICE OF CHILD DEVELOPMENT (hereinafter

referred to as "HEW/OCD"). (D.C. 5, 7)

The Appellee, LESTER MILLER, is the Board Chairman of the GLEN COVE CHILD DAY CARE CENTER, INC. (hereinafter referred to as "GCD") (D. C. 5)

As the Community Action Agency for the County of Nassau, EOC has set up in the County of Nassau some eleven delegate agencies in eleven target poverty areas of the county for the purposes of operating local programs in the aforesaid eleven target areas. (D.C. 2)

In order to carry out its responsibilities for the planning, coordination and evaluating and administration of the Community Action Programs mandated by 42 USCA 2795, EOC has authority to receive and administer funds and contributions from private or local public sources as well as any Federal or State assisted sources which may be used in support of the Community Action Programs. (John Kearse affidavit dated May 31, 1974 p. 2, hereinafter referred to as "J.K. \_\_\_\_"). The funding for the operation of these local delegate agencies comes from various sources, among which are the Federal Office of Economic Opportunity and HEW/OCD. (J.K. 2)

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Among the various special programs contemplated in the Economic Opportunity Act of 1964 was a program known as "Project Headstart" which focused upon preschoolage children and attempted to provide comprehensive health, nutritional, educational and social and other services, and further provides for the direct participation of the parents of such children in the development, conduct and overall program direction at the local level. (See 42 USCA 2809)

(D.C. 3)

The HEW/OCD was and is the funding agency for the aforesaid "Project Headstart" program. (D.C. 3)

In accordance with the above, EOC had contracted with its delegate agency in the Glen Cove area, to wit: The Glen Cove Economic Opportunity Council, Inc. (hereinafter referred to as "GCEOC") to be the Community Action Program agency in the Glen Cove poverty area. (D.C. 2) As delegate agency, the GCEOC was also to administer the Headstart Program in the Glen Cove area and did in fact administer the Headstart Program until March 1972 with funds supplied to it by the EOC. (D.C. 3-4)

On or about October, 1971 the GCD requested subdelegate or delegate status of EOC. (D.C. 4) Although this was in

direct contravention of the rules and guidelines set forth by HEW/OCD, as well as those of the Office of Economic Opportunity. EOC inquired of the Office of Economic Opportunity as to their position, and was informed by Harry Vega, the Acting Director of the Community Action Program's Regional Office, that they looked unfavorably on delegate or subdelegate status for GCD. (J. K. 5 and Exhibit 3 thereto) In addition, EOC, by its investigation, determined that the GCD lacked a policy committee structure which was required by HEW/OCD, and which gave parents the right to make final adjudications for their center.

(D.C. 4-5) As a result thereof, GCD was advised by EOC pursuant to HEW/OCD instructions that the EOC, following the review and decision of the full year Headstart policy council, decided not to fund GCD in Glen Cove until such time as the defects were corrected. (D.C. 5 and J.K. 8 and Exhibit 21 thereto) The program was thereafter continued directly by EOC on behalf of the GCEOC.

Thereafter, EOC proceeded to make plans to fund the Headstart Program through the Glen Cove Economic Opportunity Council, the Glen Cove delegate agency, as had been done prior to March, 1972. This was decided at EOC's policy council hearing of August 16, 1972, which was held for

the purpose of reviewing the Headstart Program in Glen Cove and which was attended by Carol Gionta, the Community Representative of HEW/OCD, and Lillian Alexander, the Parent Program specialist of HEW/OCD. (J.K. 9) Hence, HEW/OCD was aware and assented to these plans.

Thereafter, GCD sought review of EOC's decision by the New York Regional Office of HEW/OCD. (D.C. 5)

On or about August 30, 1973, HEW/OCD determined that the denial of the refunding by the EOC to the GCD was improper. (D.C. 6,7) It should be pointed out that said determination contained no reasons relevant to the merits of the appeal and no underlying findings of fact. (See POINT IIB of this brief)

Thereafter, on or about September 24, 1973 the EOC requested a review of the New York Regional decision. (D.C. 7 and J.K. Exhibit 27) On or about October 11, 1973 SAUL ROSOFF contacted the EOC and advised that he would review said decision and render a final determination as to whether or not a denial of the funds by the EOC to GCD was proper. (J.K. Exhibit 27)

No formal rules or regulations for such a review have

ever been promulgated. (D.C. 19-20; POINT I of this brief) The review by SAUL ROSOFF was made on the basis of correspondence between EOC and HEW/OCD and between GCD and HEW/OCD. (D.C. 8 and J.K. Exhibit 27) No hearing was ever had, nor did either side appear, and the only record in the case made was the aforesaid correspondence. (D.C. 8, 21-23 and J.K. Exhibit 27; see POINT IIB of this brief)

Thereafter, on or about November 19, 1973, SAUL ROSOFF, rendered a decision requiring the EOC to fund the GCD for the Headstart Program. (D.C. 9 and J.K. Exhibit 27)

No findings of fact, nor basis for the decision was ever made. (D.C. 9 and J.K. Exhibit 27; see POINT IIB of this brief)

A very important factor of the District Court decision was Judge Mishler's desire that the case be dealt with speedily, so that it could eventually be dealt with by this Court. At a hearing before Judge Mishler on May 3, 1974, he stated, at page 71 of the transcript:

THE COURT: The quicker I can decide this -- I might say, even if my decision may ultimately prove to be wrong or partly wrong, I think it's just as important that I get my opinions filed in a hurry so that the unhappy party can go up to the Court of Appeals and get a determination.

POINT I

THE DECISION BY THE DEPARTMENT OF HEALTH, EDUCATION & WELFARE TO DEOBLIGATE THE APPELLANT WAS INVALIDLY MADE IN THAT IT WAS ARBITRARY, CAPRICIOUS, INCONSISTENT WITH APPLICABLE STATUTES AND REGULATIONS AND UNSUPPORTED BY SUBSTANTIAL EVIDENCE

POINT IA

THE APPELLANT ACTED IN ACCORDANCE WITH DEPARTMENT OF HEALTH, EDUCATION & WELFARE AND THE OFFICE OF ECONOMIC OPPORTUNITY INSTRUCTIONS AT ALL TIMES IN ITS DEALINGS WITH GLEN COVE CHILD DAY CARE CENTER, INC.

It is undisputed that the reason for EOC's defunding of GCD was EOC's finding that GCD did not have a policy committee which conformed to HEW/OCD guidelines. An affidavit of JOHN KEARSE, Executive Director of EOC, sworn to on May 31, 1974, was submitted to the District Court, inter alia, to clarify the factual situation leading up to the defunding of GCD. For the purposes of the Summary Judgment motion below, all facts alleged therein must be accepted as true.

As Mr. Kearse points out, EOC and GCD were engaged in an ongoing dialogue concerning, inter alia, GCD's failure to structure their policy committee so that at least 51% of said committee would be parents of Headstart students.

(J.K. 4-7 and Exhibits 6, 15, 20 and 21 thereto) It must be pointed out that EOC attempted to maintain the Headstart Program in Glen Cove by offering assistance to the Headstart policy committee in the hopes that they would be able to get a group of parents involved in the policy committee who would be willing to assume responsibility for the operation of the Headstart Program as would be consistent with the guidelines set forth by HEW/OCD. In fact, even though EOC and HEW/OCD were aware that the policy committee was not properly constituted, in that it lacked sufficient parental involvement under HEW/OCD guidelines, EOC obtained specific permission from the HEW/OCD to permit this situation to exist for the fiscal year 8/1/71 through 7/31/72, so as not to close down the Headstart Program in Glen Cove. (J.K. 5-6 and Exhibit 14 thereto)

From 1970 through 1972 EOC made extensive attempts to correct the defects in GCD's program. It is obvious that HEW/OCD was well aware of EOC's attempts to rectify this situation, since Elaine P. Danavelli, the Acting Assistant Regional Director for Headstart and Child Development of HEW/OCD was present at the January 26, 1971 board meeting of GCD,

(J.K. Exhibit 5), and since Carol Gionta, the OCD Community Representative, and Lillian Alexander, the OCD Parent Program Specialist, were present at the August 16, 1972 policy council meeting of EOC (J.K. Exhibit 22) where this issue was discussed.

Despite these attempts, EOC received a letter dated July 7, 1972 from Mrs. Danavelle. In this letter, HEW/OCD specifically stated to EOC that GCD could not continue to operate without conforming to HEW/OCD guidelines. (J.K. 5-6 and Exhibit 14 thereto) Mr. Kearse then informed GCD that EOC must defund them as a result of HEW/OCD's guidelines and the specific directive of Mrs. Danavelle. (J.K. 6 and Exhibit 15 thereto) A failure by EOC to have complied with this directive would have jeopardized the funding of and consequently the entire Headstart program.

All of the above makes it clear that it was no small shock to EOC when HEW/OCD decided that GCD should be funded in direct conflict with HEW/OCD's guidelines and HEW/OCD's advice to EOC.

In October 1971, GCD attempted to obtain delegate or subdelegate status with respect to Project Headstart in Glen Cove (D.C. 4) As a result of said attempt, EOC made inquiry to the Regional Office of the Office of Economic

Opportunity (the predecessor of HEW/OCD as administrator of the Headstart Program) requesting clarification of their position on delegate or subdelegate status for GCD. EOC was subsequently advised by Mr. Harry Vega, the Acting Director of the Community Action Program that administration of Headstart can only be delegated to a local CAP Board, such as Glen Cove EOC and that subdelegation "is frowned upon by the Office of Economic Opportunity". (J.K. 5 and Exhibits 3 and 9 thereto) Therefore, HEW/OCD's decision that EOC fund GCD, or alternatively that HEW/OCD would fund GCD directly, is in direct contradiction to HEW/OCD's position that they frown on delegate or subdelegate status for GCD.

POINT IB

THE GLEN COVE CHILD DAY CARE CENTER, INC.  
WAS NOT OPERATING IN CONFORMANCE WITH  
DEPARTMENT OF HEALTH, EDUCATION & WELFARE  
STANDARDS

Appellant herein contends that the decision of the Appellee HEW/OCD to deobligate the funding of the Glen Cove Headstart Program to the Appellant and to directly fund the GCD was an arbitrary and capricious decision, which failed to meet the standards promulgated by HEW/OCD and the Office of Economic Opportunity themselves. The District Court held that HEW/OCD's decision did not constitute "a clear error in judgment". (D.C. 25) This was based on his finding that GCD

made a "good faith effort" to comply with HEW/OCD standards. (D.C. 25-26) These standards are set forth in the Transmittal Notice of the Headstart Policy Manual 70.2 which reflect the changes in Public Law 90-22 of December 23, 1967, Part B, Section 222(i)(b). The aim of these standards was to increase to the fullest extent possible, the opportunities for Headstart parents to influence the character of programs effecting the development of their children. Instruction I-30-2 Section B2 of the aforesaid Transmittal Notice 70.2 of the Headstart policy states as follows:

It is clear that the success of Headstart in bringing about substantial changes demands the fullest involvement of the parents, parental substitutes and families of children enrolled in its programs.

In addition, the organizational charts indicated in the aforesaid Headstart Policy Manuel, Section B2 mandate the composition of the various Headstart policy committees and Headstart policy councils. Appellant herein contends that based on their investigation at the local level, they have ascertained that GCD has failed to live up to the requirements as set forth in the aforesaid Headstart Policy Manual in terms of their organizational composition. It was on this basis and on the basis of the

above mentioned directive of HEW/OCD that the EOC decided not to fund the GCD for the Headstart Program. Instead, EOC proceeded with plans to contract with its delegate agency, the Glen Cove Economic Opportunity Council, Inc., as the sole agency to administer the Headstart Program in Glen Cove. The decision by HEW/OCD to compel EOC to fund GCD or in the alternative, to defund EOC and to fund GCD directly, flies in the face of the standards and requirements as set forth by HEW/OCD and the Office of Economic Opportunity. Therefore, it is obviously an arbitrary and capricious decision, which is inconsistent with the applicable statutes and regulations, and is unsupported by substantial evidence. Hence, the District Court erred in its finding that HEW/OCD's action was not "a clear error in judgment."

#### POINT II

THE STANDARDS AND PROCEDURES UTILIZED BY THE DEPARTMENT OF HEALTH, EDUCATION & WELFARE IN DECIDING GLEN COVE CHILD DAY CARE CENTER, INC.'S APPEAL WERE FATALLY DEFECTIVE

#### POINT IIA

DEPARTMENT OF HEALTH, EDUCATION & WELFARE FAILED TO APPLY THE STANDARDS FOR APPEAL FORMULATED IN OFFICE OF ECONOMIC OPPORTUNITY INSTRUCTION 6441-1

The Federal Appellees' failure to conform to Office of Economic Opportunity Instruction 6441-1 constituted error which should have been reversed by the District Court.

Instruction 6441-1, entitled "Appeal to OEO by an organization that would like to serve as a delegate agency" provides in part that:

#### 4. CRITERIA FOR RESOLVING APPEAL

The responsible OEO official shall, whenever possible, decide the appeal before the CAA submits its formal funding request. To maintain the principle of local initiative in community action programs, the responsible OEO official will sustain the action of the CAA unless he finds that:

- (a) the CAA did not give fair and adequate consideration to the rejected applicant's application, or
- (b) the decision of the CAA will have a decidedly adverse effect on the quality of the overall community action program in the local community or would preclude achievement of the objectives of a Special Emphasis program as described in Section 222(a) of the Act.

If the responsible OEO official concludes that the CAA did not provide fair and adequate consideration of the application, he shall return it to the CAA with the requirement that it reconsider the application and inform the responsible OEO official in writing of the steps taken to reconsider the application and of the decision reached. (emphasis added)

In its Supplemental Memorandum, the Federal Appellees admit that "HEW never claimed to have followed OEO Instruction No. 6441-1." (See Federal Appellees' Memorandum, p. 2). The District Court agreed, finding that "OCD's action did not

conform to OEO's Instruction". (D.C. 24) However, the District Court ruled that HEW/OCD was not bound by Instruction 6441-1. A discussion of the relevant facts will demonstrate that the said ruling constituted reversible error.

The District Court ruled that HEW/OCD was not bound by OEO Instruction 6441-1, as a result of a document entitled "MEMORANDUM OF UNDERSTANDING RELATING TO DELEGATION OF PROJECT HEADSTART". This is an agreement between OEO and HEW/OCD, relating to Office of Economic Opportunity's delegation of power and authority under the Economic Opportunity Act to HEW/OCD. This agreement, dated July 6, 1973 states in part that:

In carrying out Project Head Start, DHEW may follow or, subject to prior consultation with the Director of OEO, rescind, amend, modify, or otherwise change, in whole or in part, any applicable OEO instruction, regulation, issuance, or guideline as it deems necessary or appropriate.

The District Court erred in its application of this agreement to the instant case, as well as in its interpretation of said agreement.

GCD submitted its appeal of EOC's decision to defund it prior to July 6, 1973. As it is noted above, the Memorandum of Agreement was not entered into until July 6, 1973. It is

undisputed that prior to that date, Instruction 6441-1 set forth the standards for deciding appeals by organizations that would like to serve as a delegate agency. The District Court specifically found that HEW/OCD did not follow these standards. (D.C. 24) It would be offensive to all commonly recognized concepts of justice, to allow HEW/OCD and GCD to circumvent HEW/OCD's duties under Instruction 6441-1, by entering an agreement modifying said duties, after OCD has instituted an appeal.

It is equally clear that even if the Memorandum of Agreement dated July 6, 1973 did apply to the instant case, it would not validate HEW's actions. The Memorandum of Agreement states that:

In carrying out Project Head Start, DHEW may follow or, subject to prior consultation with the director of OEO (emphasis added) rescind, amend, modify or otherwise change in whole or in part, any applicable OEO instruction, regulation, issuance or guideline it deems necessary or appropriate.

The District Court found this language to be "permissive" and, therefore, concluded that "HEW did not err in failing to observe the procedures contained in OEO Instruction 6441-1." (D.C. 24) This finding was clearly in error. The Memorandum of Agreement clearly allows HEW/OCD to depart from

Instruction 6441-1, only after consultation with the Director of OEO. It is undisputed that this consultation did not occur.

POINT IIB

DEPARTMENT OF HEALTH, EDUCATION & WELFARE'S AD HOC FORMULATION OF APPELLATE ADMINISTRATIVE PROCEDURE CONSTITUTED PREJUDICIAL ERROR WHICH THE DISTRICT COURT SHOULD HAVE SET ASIDE

Assuming arguendo, that HEW/OCD did indeed have the power to hear the appeal from GCD (even though it had not promulgated formal rules) then in that case, Paragraphs (2) and (3) of Section 604 of the EOA then come into play.

In this connection, the Court's attention is respectfully directed to the rules and review procedures for the denial of a recipient's application for refunding, or for the suspension and termination of assistance. It should be noted that the OEO Notice #6730-2 (See Plaintiff's Memorandum of Law, Exhibit 3 thereto) requires that before rejecting an application of a recipient for refunding or reducing the refunding, OEO shall notify the recipient of its intention to do so, and must offer the recipient an opportunity to submit written material and "to meet informally with an OEO official to show cause why its application for refunding should not be rejected or reduced". In this connection, the Court's

attention is respectfully directed to the Delegations of Authorities from the Office of Economic Opportunity to the Secretary of HEW as approved by the President of the United States and the Headstart Memorandum of Understanding between the OEO and Department of HEW. (See Plaintiff's Memorandum of Law, Exhibits 4 and 5 thereto)

The Court's attention is respectfully directed to Paragraph A2 (c) of the aforesaid Memorandum of Understanding. The Memorandum of Understanding clearly states as follows:

If HEW proposes to fund an agency other than a CAA or Title III-B grantee, as the case may be in an area where such an agency exists, HEW shall solicit the views of such agency prior to funding. If the agency does not concur in the proposed funding, HEW shall solicit the views of the OEO Regional Director. If the OEO Regional Director does not concur in the proposed funding HEW shall make the grant only with the concurrence of the Director of the OEO.

Since this has not been done, it is again obvious that HEW/OCD's decision was procedurally defective.

The Court's attention is also respectfully directed to the request by EOC for a meeting with Mr. Rosoff of HEW/OCD. (See Plaintiff's Memorandum of Law, Exhibit 6 thereto) This requested meeting was, of course, denied.

The District Court's decision must be reversed and the

administrative appeals must be declared null and void because proper procedure for said appeals was not followed. In deciding for the Appellees, the District Court relied on Sun Oil Company v. Federal Power Commission, 256 F. 2d 233 (5th Cir. 1958) cert. denied 358 U.S. 872 for the proposition that:

In a particular case an administrative agency may relax or modify its procedural rules and its action in so doing will not be subjected to judicial interference in the absence of a showing of injury or substantial prejudice.

(256 F. 2d at 239 quoted on p. 20 of Judge Mishler's decision)

A brief discussion of the facts in Sun Oil will clearly demonstrate that procedural flexibility was desirable and proper in that case. Whereas, a comparison of Sun Oil to the instant case will show why the instant case must be distinguished, and why the ad hoc administrative procedure constituted reversible error.

In Sun Oil, the petitioner was a member of a number of natural gas pooling arrangements. Under said arrangements natural gas producers would pool their products and one member of the pool would be the "operator" who would enter into contracts of sale of said gas. Prior to September 27,

1956, pursuant to an F. P. C. rule, all members of such pooling arrangements could file rate schedules and procure certificates of public convenience. As a result of this policy, and as a result of the widespread use of pooling arrangements, the F. P. C. found itself faced with a situation which:

not only added substantially to the increased burden of handling and processing by the Commission and its staff, but caused confusion and complications which the Commission regarded impairing its efficiency and as unnecessary in carrying out the duties imposed on it by the (Natural Gas) Act.

(256 F. 2d at 236)

Hence, the F. P. C. had a valid and convincing reason for departure from former procedures in Sun Oil; to wit: an overburdening case load.

To alleviate the above problem, the F. P. C. promulgated a rule which retroactively disallowed non-operator pool members, who did not sign sales contracts, from filing rate schedules and obtaining certificates of public convenience.

Sun Oil Company's challenge to this procedure was rejected by the Court of Appeals for the Fifth Circuit on the grounds that there was no showing of "injury or substantial prejudice" to Sun Oil. The basis for said finding was

that the Court was unwilling to assume that the "operators" would advance their own interests to the injury or prejudice of non-operator co-owners, such as Sun Oil. Nor did the Court fear that the F. P. C. would deny Sun Oil from intervening in any proceeding where its rights of substance were involved and where it might be prejudiced by not being able to participate.

The instant case is clearly distinguishable from Sun Oil for at least two reasons. (1) The Appellees herein have not offered, nor has the District Court found any valid reason for their failure to promulgate and adhere to formal administrative procedures. (2) The Appellant herein has suffered a substantial injury and its substantial rights have been greatly affected by HEW's deobligation of funds from its budget. The District Court specifically recognized the injury to Appellant at p. 15 of its opinion, stating:

Rosoff's decision impaired that planning and administrative function, thereby causing 'injury in fact' to the plaintiff. Furthermore, the alleged injury was to an interest arguably within the zone of interests to be protected, or regulated by the Economic Opportunity Act.

The District Court's uncalled for reliance on a demonstrably distinguishable case from another circuit, provides no basis

for the District Court's affirmance of Rosoff's ad hoc determinations.

Instead of following a Fifth Circuit case, the District Court should have been bound by the ample precedent set by the United States Supreme Court. The Supreme Court has made it abundantly clear that where administrative action affects substantial interests, the administrative agency is required to follow established procedures. Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1957); United States ex rel Accardi v. Shaughnessy, 347 U.S. 260 (1954). In these cases, the Secretary of the Interior, the Secretary of State and the Board of Immigration Appeals, respectively, failed to follow applicable administrative procedures. In all cases, arguably "adequate" procedures were followed, yet the Supreme Court held that these procedures were defective because of their failure to follow applicable procedures, and because they affected substantial interests of the party involved.

As is demonstrated above, the District Court recognized that HEW/OCD's decision adversely affected EOC's "planning and administrative function". The faultiness and injurious

nature of the procedures used by HEW/OCD is further highlighted by the inadequacy of the administrative decision rendered by Josue Diaz in his August 30, 1973 letter to EOC's board chairman. This decision in no way reflects on the merits of the appeal by GCD. (D.C. 6) If the Court accepts Appellant's argument in Point IIA of this brief, to wit: that OEO Instruction 6441-1 is applicable, HEW/OCD should have decided whether "the CAA did not give fair and adequate consideration to the rejected applicant's application". Even if this Court rejects that argument, the issue before Mr. Diaz was whether or not GCD operated pursuant to Federal guidelines, i.e., whether GCD's program had the required amount of parental involvement. HEW/OCD ignored both of these issues, and in so doing, ignored the merits of the case.

The inadequacy of the procedures applied by HEW/OCD is further demonstrated by their failure to indicate findings of fact, which are essential to effective review of administrative decisions. Without them, the reviewing court is unable to determine whether a decision reached by an administrative agency follows as a matter of law from facts stated as its

basis, and whether facts so found have any substantial support in the evidence. USV Pharmaceutical Corp. v. Secretary of Health, Education and Welfare, 466 F. 2d 455 (D.C. Cir. 1972) The Court may require the decision maker to articulate the factor relevant to the agency's decision. Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F. 2d 584 (D.C. Cir. 1971) The Administrative Procedure Act, Section 706(2)(f) states, inter alia, that "...The reviewing court shall... hold unlawful and set aside agency action, findings, and conclusions found to be ... unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." It is clear that the reviewing court cannot give effect to this section in the absence of factual findings by the administrative agency.

### POINT III

THE FEDERAL APPELLEES DID NOT HAVE AUTHORITY TO DEFUND THE APPELLANT IN LIGHT OF THEIR FAILURE TO PRESCRIBE PROCEDURES FOR APPEALS, PURSUANT TO 42 U.S.C. 2944 (ECONOMIC OPPORTUNITY ACT SECTION 604)

It is undisputed that GCD appealed to HEW/OCD from a decision by EOC not to continue to fund GCD. It is further agreed by all sides herein that the outcome of the aforesaid appeal was a direction by HEW/OCD to EOC to fund the GCD

directly or that HEW/OCD would undertake to fund it directly and reduce the grant to the EOC by a like amount.

Appellant herein contends that this decision by HEW/OCD was invalid, and a nullity in that HEW/OCD failed to promulgate any procedures to cover the instant situation as required by Section 604 of the OEA of 1964 (42 U.S.C. 2944). The District Court made light of the fact that no procedures were ever formulated and held, with no explanation, that the power of the District Court to hear appeals is "implicit in the statute". (D.C. 18) This section states as follows:

The Director shall prescribe procedures to assure that -

(1) Special notice of and an opportunity for a timely and expeditious appeal to the Director is provided for an agency or organization which would like to serve as the delegate agency under Title I-B or II and whose application to the prime sponsor or Community Action Agency has been wholly or substantially rejected or has not been acted upon within a period of time deemed reasonable by the Director

(2) Financial assistance under Title I-B, II and III-B shall not be suspended for failure to comply with the applicable terms and conditions, except in emergency situations, nor shall an application for refunding under Section 123, 221, 222, or 312 be denied unless the recipient agency has been given reasonable notice and opportunity to show cause why such action should not be taken; and

(3) Financial assistance under Title I-B, II and III-B shall not be terminated for failure to comply with applicable terms and conditions unless the recipient agency has been afforded reasonable notice and opportunity for a full and fair hearing.

It is undisputed that with respect to the appeal by GCD to HEW/OCD, it is paragraph (1) of Section 604 which is applicable. It is further undisputed that HEW/OCD never promulgated any formal regulations with respect to these appeals. (See page ii of MEMORANDUM OF LAW IN OPPOSITION TO APPLICATION FOR PRELIMINARY INJUNCTION submitted by the Federal Appellees).

Appellant, therefore, contends that, since the HEW/OCD failed to conform to paragraph (1) of Section 604 it had no power to hear the appeal in the first place and obviously it had no power to render a decision with respect thereto. Therefore, the District Court erred in holding that the Director's power to hear appeals is not affected by the absence of formally promulgated procedures.

#### POINT IV

DEPARTMENT OF HEALTH, EDUCATION & WELFARE'S DECISION TO FUND GLEN COVE CHILD DAY CARE CENTER, INC. DIRECTLY WAS IN EXCESS OF DEPARTMENT OF HEALTH, EDUCATION & WELFARE'S STATUTORY AUTHORITY

Public Law 90-22 of December 23, 1967, Part B, Section 222(i)(b) as indicated in the Transmittal Notice of the

Headstart policy manual 70.2, specifically indicates in the chart herein provided that it is within the province of the Community Action Agency (the Appellant herein) to determine the delegate agencies and areas in the community in which Headstart Programs will operate. Therefore, HEW/OCD's decision to fund GCD directly, was in contravention of the applicable statute. In spite of this, the Trial Court ruled that said decision to fund GCD directly is authorized by Section 222 of the Equal Opportunity Act, 42 U.S.C. 2809(a), which states in part:

Special Programs and assistance--Authority of Director; conditions and criteria

(a) In order to stimulate actions to meet or deal with particularly critical needs or problems of the poor which are common to a number of communities, the Director may develop and carry on special programs under this section. This authority shall be used only where the Director determines that the objectives sought could not be effectively achieved through the use of authorities under section 2808 of this title, including assistance to components or projects based on models developed and promulgated by him. It shall also be used only with respect to programs which (A) involve activities which can be incorporated into or be closely coordinated with community action programs, (B) involve significant new combinations of resources or new and innovative approaches, or (C) are structured in a way that will, within the limits of the type of assistance or activities contemplated, most fully and effectively promote

the purposes of this subchapter. Subject to such conditions as may be appropriate to assure effective and efficient administration, the Director may provide financial assistance to public or private non-profit agencies to carry on local projects initiated under such special programs; but he shall do so in a manner that will encourage, wherever feasible, the inclusion of the assisted projects in community action programs, with a view to minimizing possible duplication and promoting efficiencies in the use of common facilities and service, better assisting persons or families having a variety of needs, and otherwise securing from the funds committed the greatest possible impact in promoting family and individual self-sufficiency. Programs under this section shall include those described in the following paragraphs:

Project Headstart; participation of the non-poor fee schedule

- (1) A program to be known as "Project Headstart" focused upon children who have not reached the age of compulsory school attendance which (A) will provide such comprehensive health, nutritional, education, social and other services as the Director finds will aid the children to attain their full potential, and (B) will provide for direct participation of the parents of such children in the development, conduct and overall program direction at the local level. (emphasis added)

While this statute does authorize the Director of HEW/OCD to by-pass the Community Action Agency and fund a private agency directly, the language of the statute makes

it clear that this is only authorized under very specific circumstances. It is equally clear that these very specific circumstances did not exist in the instant case.

The first emphasized requirement in the statute is that a special program be conducted only when the Director determines that the objectives sought could not be effectively achieved through a Community Action Agency. The record is devoid of any evidence that the Director made such a determination or that there was any rational basis for such a determination. The only factor that has prevented EOC from conducting an effective Project Headstart in the Glen Cove area, is the Director's decision to defund them. EOC was only defunded as a result of following HEW/OCD instructions. (See POINT IA of this brief) To uphold the Trial Court on this point would be to allow the direct funding of GCD to be the rationale for itself. This would be illogical and an exercise in circular reasoning.

Another emphasized requirement in the above quoted statute is that special programs be conducted only in a manner that will encourage, whenever feasible, inclusion in a Community Action Program with a view to minimizing duplication. It is clear in this instance that Project

Headstart would have been run with the Community Action Program but for HEW/OCD's standards for parental involvement. Rather than encouraging inclusion in the Community Action Program, HEW/OCD has effectively prevented it.

The statute further requires that Project Headstart programs which are directly funded provide for direct participation of the parents of the children enrolled in the development, conduct and overall program direction. It is uncontested herein that there was not this type of parental participation at GCD, and in fact, this lack of participation was the basis for the Appellant's decision to defund GCD in the first place! (See POINT IB of this brief)

The obvious failure to satisfy any of the above three requirements of 42 U.S.C. 2809(a) dictate that this Court overrule Judge Mishler's determination that the direct funding of GCD in this case is authorized.

#### CONCLUSION

For the above stated reasons, the Appellant respectfully requests: (1) that this Court reverse the decision of the District Court granting Summary Judgment for the

Appellees; (2) that this Court direct the District Court to grant the Appellants' cross-motion for Summary Judgment, thereby granting the following relief:

- (a) a declaratory judgment that the decision of HEW/OCD, as rendered by Saul Rosoff, dated November 13, 1973, be declared void, invalid and of no effect;
- (b) that EOC be declared to have the sole authority in its status as grantee agency to choose the delegate agency for the Headstart programs in the County of Nassau, pursuant to HEW/OCD mandates presently in existence;
- (c) that GCD be enjoined from spending or otherwise utilizing any such funds already furnished it by HEW/OCD; and
- (d) that the monies originally allocated by HEW/OCD to EOC, for use in the Glen Cove Headstart Project, be reinstated and provided to EOC; and (3) for such other and further relief as to this Court may seem just and proper.

Respectfully Submitted,

MALONE, DORFMAN & TAUBER

CHARLES TAUBER,  
Of Counsel.  
RICHARD H. WAXMAN,  
On Brief.

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X

ECONOMIC OPPORTUNITY COMMISSION  
OF NASSAU COUNTY, INC.,

Appellant,

AFFIDAVIT OF SERVICE

-against-

Case No. 74-2248

CASPAR WEINBERGER, et al.,

Appellees.

-----X

STATE OF NEW YORK )  
SS.:  
COUNTY OF New York )

Robert L. Ford, being duly sworn, deposes  
and says:

Deponent is not a party to the action, is over 18  
years of age, and resides at 755 Hancock Street Brooklyn, New York  
On November 27, 1974, deponent served two  
copies each of the APPELLANT'S BRIEF upon the following:

<u>Name</u>	<u>P.O. Address</u>
Wrenn & Schmiedd, Esqs. Attorneys for Appellee Les R. Miller, individually and as President of the Glen Cove Child Day Care Center Inc.	26 Court Street Brooklyn, New York
David G. Trager, Esq. United States Attorney Eastern District of New York, Attorney for Federal Appellees.	225 Cadman Plaza East Brooklyn, New York

at the addresses opposite their names.

SPRING  
ERASABLE  
COTTON CONTENT

Robert L. Ford

Sworn to before me this  
27th day of November, 1974.

Roland W. Johnson

Notary Public

ROLAND W. JOHNSON  
Notary Public, State of New York  
No. 459870  
Qualified in Delaware County  
Commission Expires March 30, 1975